

**David Cosson**  
ATTORNEY AT LAW

2154 Wisconsin Ave, N.W.  
Washington, D.C. 20007

Telephone (202) 333-5275  
Telecopier (202) 333-5274

March 11, 2011

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

By Electronic Filing

Re: Joint Petition of Accipiter Communications, Inc. and Qwest Corporation for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules, Petition for Waiver of Sec. 69.3(e)(11) of the Commission's Rules. CC Doc. No. 96-45

Ex Parte Notice

Dear Ms. Dortch:

On March 10, 2011 Lewis van Amerongen, Phillip Sotel, Patrick Sherrill and I, representing Accipiter Communications, Inc. met with Zachary Katz, Legal Advisor to the Chairman for Wireline Communications, International and Internet Issues; Carol Matthey, Deputy Chief of the Wireline Competition Bureau and Amy Bender, Deputy Chief of the Telecommunications Access Policy Division. The purpose of the meeting was to discuss Accipiter's Application for Review of the decision of the Wireline Competition Bureau denying the joint Petition of Accipiter and Qwest for waiver of the frozen study area rule.

The Accipiter representatives provided the following information in response to a request for a brief history: The company was formed in 1995 and purchased a small exchange in the Arizona desert from US West (now Qwest) for \$1. Upon receipt of a study area waiver from the Commission, Accipiter proceeded to modernize the facilities and expand the network to provide service to many households previously without telephone service. Because the population density is low and the terrain rugged, Accipiter became one of the highest cost per line companies in the country. In 2001 a new development, Vistancia was announced for an area of then open desert which would be partly in Accipiter's service area and partly in an area assigned to Qwest, but in which Qwest had no facilities or customers.

Accipiter recognized that the result of providing service to Vistancia would allow it to gain economy of scale, substantially lower its average cost per line and thereby significantly reduce its dependence on Universal Service support . Accordingly, in 2002 Accipiter initiated proceedings at the Arizona Corporation Commission and discussions with Qwest that ultimately resulted in an order adding a four square mile area to its certificated service area.<sup>1</sup> The ACC stated its preference that the entire Vistancia development be served by a single ILEC with Carrier of Last Resort and Eligible Telecommunications Carrier obligations.

In the course of the ACC process, Accipiter discovered that the developers in Vistancia had an agreement with Cox Communications that effectively precluded any other carrier from providing telecommunications service in the development. Accipiter initiated a complaint proceeding at the ACC regarding the anticompetitive nature of this agreement, and the U.S. Department of Justice commenced an investigation and issued a Civil Investigative Demand. The result was a November 2005 settlement agreement which eliminated the barriers to entry.

By that time, however, a significant portion of the development had been completed with Cox's telecommunications facilities installed and the utility trenches closed. Accipiter began building facilities in all new areas where the developer opened the utility construction window. In the portion of Vistancia in the proposed four square mile addition there are approximately 1900 homes for which Cox remains the sole wireline service provider. The regulatory uncertainty created by the Bureau's Order substantially inhibits Accipiter's ability to invest in this portion of Vistancia. Accipiter asks the Commission to reverse the Bureau's decision so the company can have regulatory certainty to invest in the area which would allow for new customers at low incremental investments which would drive down the company's reliance on federal high cost support.

In June 2006 Accipiter and Qwest filed a joint petition with the Commission to revise their respective study area boundaries in accordance with the public interest findings of the ACC. Accipiter responded promptly in good faith to multiple data requests from the Bureau regarding the expected impact on the Universal Service Fund, including for estimates in future years even though such impact is not relevant to the established USF impact analysis. After almost two years, Accipiter was informed that the Bureau had determined that it would not be in the public interest to grant a waiver that resulted in USF support for service to an area where a CLEC already provided service. In response to a Bureau request for suggestions, Accipiter proposed that the waiver could be conditioned "as if" the transaction were subject to the "parent trap" rule limiting an acquirer of exchanges to the high cost support of the seller, which in this case was nothing. When the Bureau later expressed concern that Accipiter would still be eligible for ICLS, Accipiter agreed to forgo ICLS as well.

Despite Accipiter's efforts to include reduce its average cost and dependence on USF and despite agreeing to forgo USF in the additional area, the waiver was denied. Accipiter could not

---

<sup>1</sup> Attachment A is a copy of a map that was distributed at the meeting. The map indicates the two larger portions of Accipiter's existing study area. The four mile square proposed addition to the study area is labeled as the South Lake Pleasant Exchange. This map was submitted to the Bureau in December 2010 in response to an unrelated data request. It was also noted that the only wireline competitor in any portion of Accipiter's study area is Cox Communications.

discern from the Bureau Order what public interest concern other than USF the Bureau might have as it had not identified any other issue in the four years of discussions. The Application for review followed.

Accipiter estimates that if the Bureau had granted the waiver even a year after it was filed, Accipiter's USF support levels today would be below \$2000 per access line, as compared with the actual current figure of approximately \$7,500 per access line. Continued growth in Vistancia would result in further reductions in future years.

In response to a question suggesting Accipiter could function as a CLEC in the four square mile area, the Accipiter representatives responded:

1. The company has carefully evaluated that option and determined that there is no business case for it to establish a stand-alone CLEC in the area. In particular, establishing such an operation would, as a function of required cost allocations, result in severe loss of support for Accipiter's low-density, high cost customers that could make service unaffordable by them. In contrast, if the four square mile area were integrated into Accipiter's existing ILEC operation, the average cost and USF support would decline, but not to the extent that rural subscribers would be harmed.

2. The ACC adjusted the service area boundaries of Accipiter and Qwest specifically because it believed the public interest required that the entire development be served by a single ILEC with Carrier of Last Resort and Eligible Telecommunications Carrier obligations. It is thus unlikely that the ACC would agree to revise its orders to the effect that there would be no ILEC and no ETC serving a significant portion of the development.

The Accipiter representatives emphasized in the discussion that it fully recognizes that the telecommunications world is rapidly changing and that the Commission's policies must change accordingly. However, the Communications Act and the Administrative Procedure Act establish requirements governing the manner in which those changes may be made and the Bureau Order is not consistent with those requirements.

Accipiter emphasized that the denial of the study area waiver greatly inhibits its ability to make network investments in the portion of the Vistancia Development located in the four square mile proposed addition to its study area. The major source of this inhibition is that the Bureau Order creates a substantial number of questions about the regulatory status of any investment Accipiter may make in the area. Specifically, the Order leaves uncertain whether Accipiter is still the ETC; whether Accipiter or Qwest is the ILEC; whether Accipiter has any 251(c) obligations; and how Accipiter is to allocate its costs jurisdictionally outside of its study area. A more detailed discussion of these issues was distributed and is included as Attachment B.

Accipiter pointed out that by granting the study area waiver the Commission would avoid having to spend time and resources resolving these difficult questions and would be able to better focus on the significant issues before it, including implementing the National Broadband Plan. Grant of the waiver would also recognize that where the sole purpose of the study area freeze, control of USF growth, is not involved in an application that is entirely proper for the Commission to accept the repeated judgment of the state commission that adjustment of the boundaries of particular ILECs is in the public interest. Further, the grant would provide the

clarity required to allow the company to continue serving Vistancia in a manner that would lower its dependence on USF support.

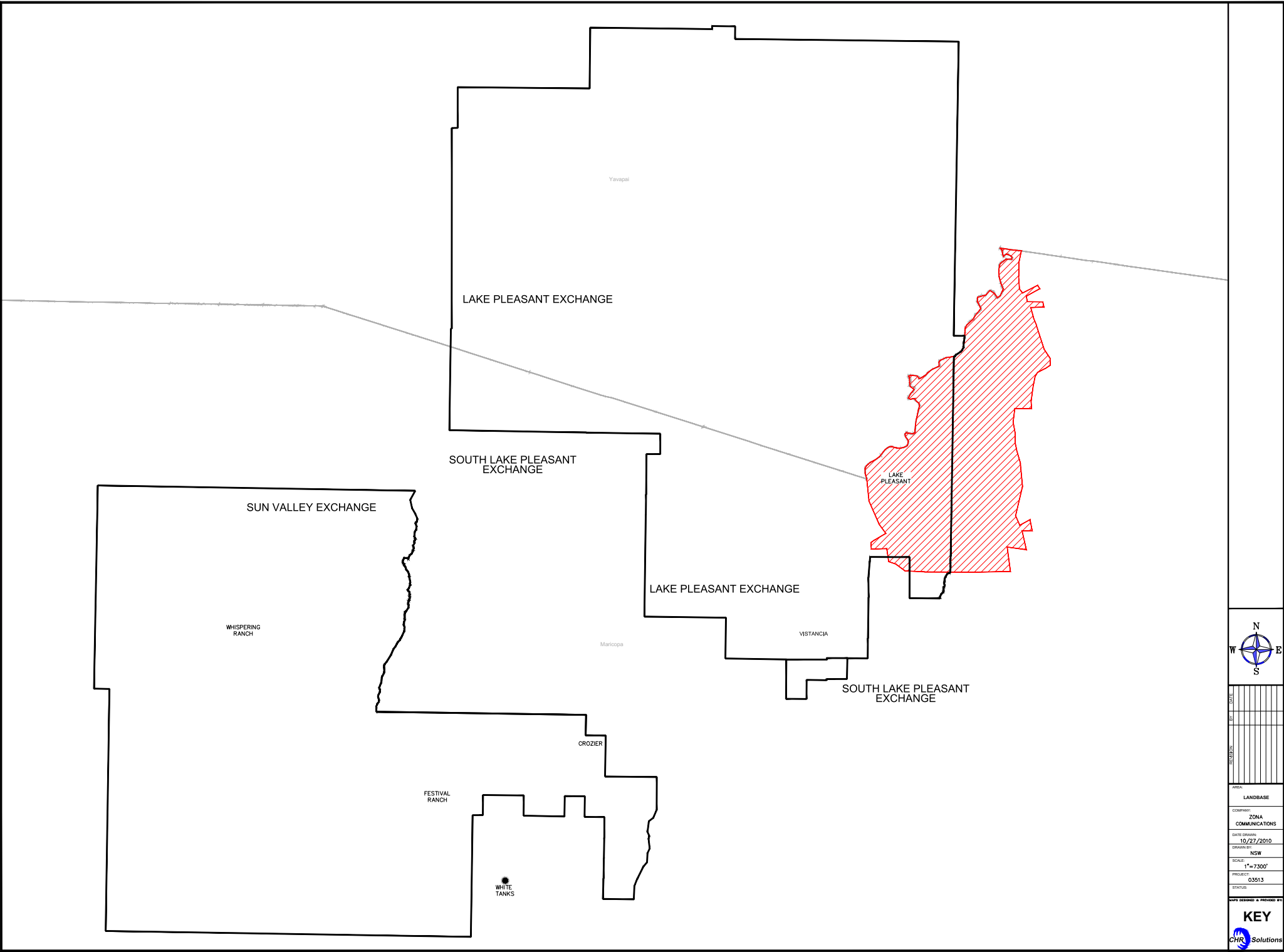
Please contact me if there are any questions on this matter.

Sincerely yours,

David Cosson  
Counsel to Accipiter Communications, Inc

Attachments

cc: Zachary Katz  
Carol Matthey  
Amy Bender  
Melissa Newman, Qwest



AREA	
LANDBASE	
COMPANY	ZONA COMMUNICATIONS
DATE DRAWN	10/27/2010
DRAWN BY	NSW
SCALE	1"=7300'
PROJECT	03513
DATE	

AREA	
LANDBASE	
COMPANY	ZONA COMMUNICATIONS
DATE DRAWN	10/27/2010
DRAWN BY	NSW
SCALE	1"=7300'
PROJECT	03513
DATE	

MAPS DESIGNED & PROVIDED BY

**KEY**

CHR Solutions

Unnecessary Regulatory Issues  
Necessarily Implied But Not Addressed by the Bureau Order

1. Which carrier is the ETC in South Vistancia?
  - a. Accipiter: An rural telephone company's ETC service area must be the same as its study area (47 U.S.C. 214(e)(5)). Because state approval for service area boundary must come before the FCC study area proceeding, if the FCC denies the waiver is the state action void *ab initio* or is the state required to grant a company's request to remove the designation?
  - b. Qwest: The ACC removed its ETC designation from the area.
  - c. Nobody: Does Congressional policy expect that there will be an ETC everywhere in order to assure the availability of Lifeline service?

2. Which carrier is the ILEC in South Vistancia?

The ACC transferred the area from Qwest's Certificate of Convenience and Necessity to Accipiter's. Does the Commission recognize Accipiter as the ILEC for all purposes in its rules?

For example, is access provided by Accipiter in South Vistancia subject to the Part 69 access rules; is Accipiter the "competing" ILEC for purposes of the application of Section 61.26 to determine the benchmark for Cox's interstate access rates for calls originating from South Vistancia?

3. Does Accipiter have obligations under Section 251(c) in South Vistancia?
4. The Part 36 Separations Rules are applied on a study area basis. What rules govern Accipiter's jurisdictional allocation of investment and expense related to South Vistancia? If Accipiter is subject to Part 69 in South Vistancia but excluded from Part 36, how does it compute its cost of providing interstate access?
5. What is the federal purpose served by requiring waiver of the study area freeze in situations where there is no USF impact? What factors are relevant to the public interest that are of federal concern?
6. What is the definition of a study area? The words in the Appendix-Glossary of Part 36 do not meet the definition of "definition." Does state certificated area establish study area boundaries as implied by *Skyline*, or was that decision based only on pre-1984 boundaries?